

The FCPA Compliance Defense: Yes or No?

February 21, 2012

Agenda

- Introduction
- Presentation
- Questions and Answers — (anonymous)
- Slides — now available on front page of Securities Docket
 - www.securitiesdocket.com
- Wrap-up

Webcast Series

- Approximately every other week
- Feb. 29: **“Recent Developments in FCPA and International Anti-Corruption Enforcement and Compliance”**

Panel



Mike Koehler

Assistant Professor of Business Law, Butler University



Howard Sklar

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THE FCPA COMPLIANCE DEFENSE YES OR NO?

Securities Docket Webcast
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PRESENTORS

✘ Mike Koehler

+ Assistant Professor of Business Law – Butler Univ.

✘ Revisiting a Foreign Corrupt Practices Act Compliance Defense (forthcoming *Wisconsin Law Review*)

✘ FCPA Professor (www.fcpaprofessor.com)

✘ Howard Sklar

+ Senior Counsel - Recommind

✘ Against An FCPA Compliance Defense (Forbes)

✘ Open Air (www.openairblog.com)

CAN WE AGREE ON SOME THINGS?



CAN WE AGREE ON THIS?

- ✘ The FCPA's Objective is to Reduce Bribery of "Foreign Officials"
- ✘ The Current Enforcement Environment is Not Best Achieving this Objective
 - + Increase in Compliance, Increase in Enforcement Actions
- The Enforcement Environment is Doing as Much as Can be Done to Motivate Compliance

CAN WE AGREE ON THIS?

- ✘ An FCPA Compliance Defense Is Not
 - + A New Idea
 - ✘ FCPA Legislative History
 - + A Novel Idea
 - ✘ Compliance Defense Concepts in Other OECD Convention Countries

CAN WE AGREE ON THIS

- ✘ A FCPA Compliance Defense Will Not
 - + Eliminate Corporate Criminal Liability
 - + Apply to Corrupt Business Organizations or Conduct Engaged in or Condoned by Executives Officers
 - + Apply to Conduct by any Employee if the Conduct Occurred in the Absence of Pre-Existing Policies and Procedures

CAN WE AGREE ON THIS?

- ✘ DOJ Already Recognizes a *De Facto* Compliance Defense
 - + Principles of Federal Prosecution of Business Organizations / Declination Decisions
 - + Opinion Procedure Releases
 - + NPAs/DPAs
- The DOJ's Offsets for Effective Compliance is More of a Credit Than a Defense

CAN WE AGREE ON THIS?

“No compliance program can ever prevent all criminal activity by a corporation’s employees”

(U.S. Attorneys’ Manual 9-28.800)

“There will always be rogue employees who decide to take matters into their own hands. They are a fact of life.” (Assistant Attorney General Lanny Breuer, Jan. 26, 2011)



CAN WE AGREE ON THIS?

- ✘ DOJ's Recognition of a *De Facto* Compliance Defense is Opaque, Inconsistent, Unpredictable and Unbound
- The Compliance Credit is Transparent, Consistent, and Entirely Predictable

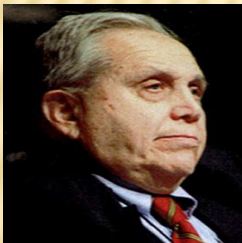


CAN WE AGREE ON THIS?

- ✘ At Present, Pre-Existing FCPA Compliance Policies and Procedures and Good Faith Efforts to Comply *Lessen the Impact of Legal Exposure*, But Does Not Reduce Legal Exposure
- ✘ Despite the Current Incentives, A Significant Percentage of Businesses are Not Implementing Comprehensive FCPA Policies and Procedures
 - + Survey Findings

CAN WE AGREE ON THIS?

- ✘ A Compliance Defense (Or Similar Concepts) is Publicly Supported By a Growing Chorus of Experienced Individuals, Including Former DOJ Officials



- And Publicly Opposed by Many as Well

LET'S START WITH SOME QUESTIONS?

- ✘ Why do FCPA Violations Occur?
 - + Do U.S. Companies Conduct Business in Foreign Markets
 - ✘ Intent on Engaging in “Bribery” Without a Commitment to FCPA Compliance?
 - ✘ With a Commitment to FCPA Compliance, Yet Subject to Difficult Conditions?
 - ✘ World’s Most Ethical FCPA Violators
 - With a Hollow Commitment to FCPA Compliance That is Contradicted by Other Messages?

FOREIGN BUSINESS REALITIES

✘ Conditions and Barriers

- + Customs, Import, License Requirements
- + Product Testing and Inspection
- + Procurement Policies



✘ Forced Business Relationships

- + Agents, Joint Ventures,
- + Customs Brokers
 - ✘ Agency Costs



YES

- ✘ A Compliance Defense Will Better Incentivize Corporate Compliance and Reduce Improper Conduct



NO

- Creating a Compliance Defense will have Results Opposite to Those Contemplated by its Supporters
 - Companies will have **Decreased** Negotiation Leverage
 - Companies will be less Likely to Self-Disclose
 - Companies will be Motivated to Create Programs That Look Good but Don't Actually do Anything to Prevent Bribery
 - How Would the Compliance Defense Have Handled the Alcatel case?

YES

- ✘ A Compliance Defense Will

- + Increase Confidence in the FCPA and FCPA Enforcement

- ✘ Corporate Enforcement Actions Will Be Confined to Corrupt Business Organizations or Those Without a Compliance Ethic

NO

- Companies Will Have no Incentive to Actually Improve Their Compliance Programs
 - Skewed Internal Information will Present a Rosier Picture of an Institution's Compliance Program Than is Actually the Case
 - Companies will be Shocked Once Their Program is Tested Against Standards

YES

- ✘ A Compliance Defense Will
 - + Allow DOJ to Better Allocate Its Limited Prosecutorial Resources
 - + Better Facilitate Prosecution of Culpable Individuals
 - + Increase the Deterrent Effect of FCPA Enforcement Actions

NO

- And Companies Will STILL not take Advantage of the “Defense,” Like They Don’t Take Advantage of the Other Affirmative Defenses
- If Made Into an Element of the Crime:
 - Are Companies so Confident That When the DOJ Goes Poking, the “House of Cards” Will Still be Standing?
 - Companies Would Much Prefer Proving the Positive to the DOJ Than Having the DOJ Proving the Negative After an Indictment in Court
 - Investigation Time
 - Investigation Scope

YES

- ✘ *Pre-Existing* FCPA Compliance Policies and Procedures and Good Faith Compliance Efforts Should be Relevant as a Matter of Law When a Non-Executive Employee or Agent Acts Contrary to Those Policies



NO

- At the End of the Day, it'll Still be the DOJ Evaluating the Program and Determining What Benefit a Company Gets

No.

A COMPLIANCE DEFENSE - YES OR NO?



Questions

Thank You
For Attending This Webcast